No. 85-2066

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In The

Supreme Court of the United States

October Term, 1986

JOHN DOYLE, BARBARA McCUEN, FRANK MISIANO, KEVIN SWEENEY, GEORGE LYNN and JOHN CONSIDINE,

Petitioners,

vs.

SUFFOLK COUNTY, SUFFOLK COUNTY CIVIL SERVICE COMMISSION, and SUFFOLK COUNTY POLICE DEPARTMENT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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No. 85-2066

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

REASONS FOR DENYING THE WRIT

I.

THE CONSTITUTIONALITY OF A STATUTE MAY PROPERLY BE DETERMINED ON A FED. R. CIV. P. 12(b)(6) MOTION.

The complaint in this action made a single allegation of unconstitutionality:

> 19. The provision of Section 58 that no person over the age of twenty-nine may be appointed to the position of police officer bears no rational relationship to any legitimate state purpose, is arbitrary, capricious, and unreasonable and, as such, deprives plaintiffs and their class of the equal protection of the laws as guaranteed by the Constitutions of the United States and the State of New York.

Appendix A. Contrary to petitioners' assertion, respondents answered the complaint and denied that allegation.[1] Appendix B. In an amended complaint, petitioners added parties but did not make any new or different allegations of unconstitutionality.

On the basis of this single allegation of unconstitutionality, petitioners assert as their first reason for granting a writ that,

> The refusal of the trial court to require respondents to . . . plead such justifications as they might for their refusal to hire persons who are 29 or older,

---

1. Respondents' motion to dismiss was made prior to the expiration of the time to answer the amended complaint.

> and subject such justifications to rebuttal by petitioners and examination by the court was error and requires a reversal and remand for those proceedings to be conducted.

Petition at 9. Petitioners, however, misapprehend the relative burdens of the parties, and a court's power to affirm the constitutionality of a statute in the absence of a trial.

In *Vance v. Bradley*, 440 U.S. 93 (1979), a case cited by petitioners, this Court specifically addressed and rejected petitioners' assertion of error. *Bradley* concerned a challenge to § 632 of the Foreign Service Act of 1946, 22 U.S.C. § 1002, which mandates retirement of participants in the Foreign Service retirement system at age 60. Appellees contended that this classification was irrational and denied them equal protection. In assessing the parties' relative burdens, this Court held:

> Appellees seem to believe that appellants had to have current empirical proof that health and energy tend to decline somewhat by age 60 and had to offer such proof for the District Court's perusal before the statute could be sustained. . . . But this case, as equal protection cases recurringly do, involves a legislative classification contained in a statute. In ordinary civil litigation, the question frequently is which party has shown that a disputed historical fact is more likely than not to be true. In an equal protection case of this type, however, those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.

Bradley, 440 U.S. at 110-11 *citing Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911); *Schilb v. Kuebel*, 404 U.S. 357, 364 (1971); *United States v. Maryland Savings-Share Ins. Corp.*, 400 U.S. 4, 6 (1970); *McGinnis v. Royster*, 410 U.S. 263, 274 (1973); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487 (1955); *Fireman v. Chicago, R.I. & P.R. Co.*, 393 U.S. 129, 138-39 (1968).

Thus, *Bradley* makes clear that petitioners have the burden to show the irrationality of the statute and that there is no corresponding or reciprocal burden on respondents. The reason is obvious. Respondents did not author or enact the challenged statute, but followed it, as they are required by law to do. Because respondents are not responsible for the statute, they cannot be compelled to be its defenders. Thus, petitioners err in claiming that respondents are required to plead justifications for the statute. Rather, the burden is entirely petitioners' to show there can be no justifications. *See Kotch v. Bd. of River Port Pilot Comm'rs*, 330 U.S. 552 (1947) (affirming dismissal of the complaint on the ground that the challenged statute is not violative of equal protection).

Petitioners' burden is a heavy one, as this Court stated in an earlier portion of the *Bradley* decision:

> [C]ourts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws. The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to

> the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.

440 U.S. at 97.

Accordingly, this Court has held on numerous occasions that all that is needed to find a legislative classification constitutional is that the Court *perceive* a rational justification. *See Schilb v. Kuebel*, 404 U.S. 357, 364 (1971) " 'Legislatures are presumed to have acted constitutionally . . . and their statutory classifications will be set aside only if no grounds can be conceived to justify them.' " (*quoting McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 809 (1969)); *United States v. Maryland Savings-Share Ins. Corp.*, 400 U.S. 4, 6 (1970) ("Normally, a legislative classification will not be set aside if any state of facts rationally justifying it is demonstrated to or perceived by the courts."); *McGowan v. State of Maryland*, 336 U.S. 420, 425-26 (1961) ("[T]he Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it."); *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S. Ct. 337, 340 (1911) ("[T]he contention is made that [the statute] is arbitrary in its classification, and consequently denies the equal protection of the laws to those whom it affects. The rules by which this contention must be tested, as is shown by repeated decisions of this Court, are these . . . 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden

of showing that it does not rest upon any reasonable basis but is essentially arbitrary."); *see also, Mass. Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 n.7 (1976); *Standard Oil Co. v. City of Marysville*, 279 U.S. 582, 586-87 (1929); *Watson v. Maryland*, 218 U.S. 173, 178 (1910); *Kotch v. Bd. of River Port Pilot Comm'rs*, 330 U.S. 552, 563 (1947); *Metropolitan Casualty Ins. Co. v. Brownell*, 294 U.S. 580, 583 (1935); *Atchison, T. & S.F.R. Co. v. Matthews*, 174 U.S. 96, 19 S. Ct. 609, 610-12 (1899).

The Second Circuit in affirming the dismissal of the amended complaint declared that the rational justification for the legislative classification found in § 58(1)(a) was self-evident. The court held: "The obvious state interest sought to be advanced by the maximum age provision is the recruitment of police personnel physically able to discharge their duties." Petition Appendix B at 13b.

The district court had dismissed the complaint on the basis of *stare decisis*. The district court held:

> In applying this standard to Section 58, courts consistently have upheld its constitutionality finding that the statute is rationally related to a legitimate government interest. *Hahn v. City of Buffalo*, 596 F. Supp. 939, 943-44 (W.D.N.Y. 1984), *aff'd on other grounds*, No. 84-7990, slip op. 5461 (2d Cir. Aug. 6, 1985); *Colon v. City of New York*, 535 F. Supp. 1108, 1113-14 (S.D.N.Y. 1982); *Sica v. County of Nassau, et al.*, CV-81-3497, Memorandum and Order (E.D.N.Y. March 9, 1982); *see also, Knapp v. Monroe County Civil Service Commission*, 77 A.D.2d 817, 437 N.Y.S.2d 136, 136 (4th Dept. 1980), *appeal dismissed*, 51 N.Y.2d 877, 433 N.Y.S.2d 1030 (1980).

> . . . It is this court's view based upon the holdings and equal protection analysis undertaken in the aforementioned cases, that Section 58(1)(a) is constitutional since rationally related to a legitimate government interest *i.e.* that of ensuring that the police force is physically able and capable of being trained.

Petition Exhibit A at 4a-5a.

Each of the cases relied on by the district court declared that the purpose of the statute was to assure the recruitment of police personnel physically able to perform their duties. Also, respondents' memoranda and briefs to both the district court and the court of appeals stated this purpose. Petitioners even acknowledged this purpose in their memorandum to the district court in opposition to respondents' motion to dismiss.[2]

Petitioners, however, fully aware of the purpose of the statute, never alleged in the complaint nor made an offer of proof of a single fact that would show this purpose to be irrational. The complaint, as quoted earlier, makes nothing but a bald assertion that the statute is unconstitutional. Petitioners' failure to set forth any facts in the complaint that even suggest irrationality, alone, makes the complaint incapable of withstanding a motion to dismiss. *Briscoe v. LaHue*, 663 F.2d 713 (7th Cir. 1981), *aff'd*, 103 S. Ct. 1108 (1983) ("[C]onclusory allegations unsupported by any factual assertions will not withstand a motion to dismiss.").

Further, petitioners have never endeavored to prove any facts

---

2. Petitioners stated on page 15 of their memorandum: "The New York State Legislature enacted Section 58 in 1965. If there is any purpose at all to the statute, it presumably links younger age with functioning as a more capable police officer."

which would show why the statute is not rationally related to its purpose. Petitioners have not even sought to avail themselves of Fed. R. Evid. 201(e), which permits the making of an offer of proof as to why judicial notice should not have been taken.

Instead, and without citing any relevant precedent, petitioners urge a rule of law that subjects respondents to protracted litigation and a full trial on the basis of a bald assertion of unconstitutionality. The injustice in terms of time and expense is manifest.

Accordingly, the complaint was properly dismissed for failure to state a claim upon the court perceiving a rational purpose for the statute.

II.

THE COURT OF APPEALS' METHODOLOGY PROPERLY RECONCILED THE OVERLAPPING CONCERNS OF THE ADEA AND N.Y. CIV. SERV. LAW § 58(1)(a).

Petitioners' assert as their second reason for granting a writ that,

> [T]he Court of Appeals ignored its constitutional obligation in performing the judicial severence of that invalid portion of that statute. . . .
>
> The Court of Appeals failed to examine the constitutionality of what was left, the prohibition against hiring that affected those in their thirties, but not those younger or older.

Petition at 20-21. As support for this assertion of error, however,

petitioners cite only Justice Brennan's dissenting opinion on this issue in *Regan v. Time, Inc.*, 104 S. Ct. 3262, 3282 (1984). The majority decision does not require such a further examination of "what was left." *See* 104 S. Ct. at 3269, *infra* p. 10. Hence, petitioners assertion of error is actually an urging that the criteria of the dissent in *Regan* for severing statutes now be adopted.

This Court, however, need not reexamine its decision in *Regan*. Petitioners' assertion of error is misplaced even under the dissent's criteria because the court of appeals examined the constitutionality of "what was left." The court of appeals began its discussion of this issue by noting:

> We are thus brought to the constitutional issue of whether the statute as it remains after partial invalidation on ADEA grounds in *Hahn* violates the Equal Protection Clause of the Fourteenth Amendment. The issue has two aspects: whether New York may deny appointment as police officers to the entire class of those who have become 29 and whether it may deny such appointment to the subclasses of those who have become 29 but not become 40 and those who have become 70.

Petition Appendix B at 12b.

The court of appeals proceeded to decide (a) whether the statute, unsevered, is constitutional, and (b) if constitutional, is it still constitutional after being severed by the ADEA. As discussed earlier, under the first step the court found the statute constitutional upon perceiving a rationale justification. Under the second step, the court found the remainder of the statute constitutional upon determining that it could not be said that it is evident that the legislature would not have enacted the statute as severed. Petition Exhibit B at 14b-16b.

This second step is in accordance with the majority decision in *Regan* which held:

> Whether an unconstitutional provision is severable from the remainder of the statute in which it appears is largely a question of legislative intent, but the presumption is in favor of severability. "Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law."

104 S. Ct. at 3269.

Petitioners' misunderstanding of the decision below stems from the fact that in *Regan* the statute was initially found unconstitutional and the issue was whether the unconstitutional part could be severed from the remainder. Here, however, the court of appeals initially found the statute constitutional and the issue was whether the part that is preempted by another statute can be severed from the remainder. Therefore, the "what is left" part of the statute was specifically found by the court of appeals to be constitutional upon finding the entire statute constitutional. There was no need to revisit the unsevered portion. The purpose of the statute did not change even though a portion was preempted by the ADEA. Consequently, the only issue once the statute was found constitutional was whether the legislature would have enacted the unsevered portion. Thus, the court of appeals met the criteria of both the majority and the dissent in *Regan*.

Accordingly, the statute as severed was properly held to be constitutional by the court of appeals below.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be denied.

Dated: New York, New York
August 14, 1986

Respectfully submitted,

JAMES M. CATTERSON, JR.
WILLIAM H. PAULEY III
Attorneys for Respondents

APPENDIX A—COMPLAINT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Index No. CV-83-3195 (JM)

JOHN DOYLE, BARBARA McCUEN, WILLIAM T. MILNE, FRANK MISIANO, JOHN J. PRESTA, and KEVIN SWEENEY for themselves and all persons similarly situated,

Plaintiffs,

-against-

SUFFOLK COUNTY, SUFFOLK COUNTY CIVIL SERVICE COMMISSION, and SUFFOLK COUNTY POLICE DEPARTMENT.

Defendants.

COMPLAINT
(CLASS ACTION)

JUISDICTION

1. This is an action to enjoin the defendants, each of which is acting under color of state law, from depriving plaintiffs and all persons similarly situated of their right to equal protection of the laws. Plaintiffs seek a declaration that New York Civil Service Law, Section 58(1)(a) (hereinafter "Section 58") is unconstitutional on its face and as applied to them, in violation of Section 1 of the Fourteenth Amendment to the United States Constitution, insofar as it compels defendants to treat plaintiffs, all of whom have passed the most recent Suffolk County Civil Service examination for the position of police officer, but are over the age of twenty-nine, differently from persons who have

passed that examination, but who have not yet passed their twenty-ninth birthday. In addition, plaintiffs seek a declaration that Section 58 violates Article I, Section II of the New York State Constitution and conflicts with the New York State Human Rights Law, Executive Law, Section 291 *et seq.* insofar as that law prohibits age discrimination in employment.

2. This court has jurisdiction under Title 42 U.S.C. Section 1983, Title 28 U.S.C. Sections 1343(3) and (4), 2201 and 2202 and under the pendent jurisdiction of the court.

INDIVIDUAL PLAINTIFFS

3. William T. Milne, a resident of Suffolk County, was born on June 22, 1953. He took and passed Suffolk County Civil Service Examination 79-5002-110 (Police Officer) (hereinafter "The Examination"), scoring 94, and was ranked 494 on the resulting certified list. He took and passed the physical, psychological and medical examinations administered by the defendants for the position of police officer. Shortly after his 29th birthday, William T. Milne was informed by the Suffolk County Civil Service Commission (hereinafter "SCCSC") that he was no longer eligible for consideration for appointment because of the requirements of Section 58.

4. Frank Misiano, a resident of Suffolk County, was born on November 6, 1952. He took and passed the Examination, scoring 94, and was ranked 495 on the resulting list. He took and passed the physical, psychological and medical examination administered by the defendants for the position of police officer. Shortly after his 29th birthday, Frank Misiano was informed by the SCCSC that he was no longer eligible for consideration for appointment because of the requirements of Section 58.

Appendix A

5. John J. Presta, a resident of Suffolk County, was born on July 3, 1953. He took and passed the Examination, scoring 94, and was ranked 520 of the resulting certified list. He took and passed the physical, psychological and medical examinations administered by the defendants for the position of police officer. On August 2, 1982 he was informed by the SCCSC that he was no longer eligible for consideration for appointment because of the requirements of Section 58.

6. John Doyle, a resident of Suffolk County, was born on September 1, 1952. He took and passed the Examination, scoring 93, and was ranked 639. In February, 1982 he was informed by the SCCSC that he was no longer eligible for consideration for appointment because of the requirements of Section 58.

7. Barbara McCuen, a resident of Suffolk County, was born on September 17, 1952. She took and passed the Examination, scoring 93, and was ranked 741. In February, 1982 she was notified that she was no longer eligible for consideration for appointment because of the requirements of Section 58.

8. Kevin Sweeney, a resident of Suffolk County, was born on February 16, 1953. He took and passed the Examination, scoring 93, and was ranked 830. In July 1982 he was informed by the SCCSC that he was no longer eligible for consideration for appointment because of the requirements of Section 58.

CLASS ACTION

9. Plaintiffs bring this action on their own behalf and on behalf of all other persons similarly situated pursuant to Rule 23(b)(2) of the Federal Rules of Civil Procedure. The class that plaintiffs represent is composed of all persons who have taken and passed Suffolk County open-competitive examination number

79-5002-110 and who have been or are subject to being eliminated by the defendants from consideration for appointment from the list resulting from that examination as a result of the operation of Section 58.

10. There are common questions of law and fact affecting the rights of the members of this class who are and continue to be classified and discriminated against in ways that deprive them of equal protection of the laws because of their age. These persons are so numerous that joinder of all members of the class is impractical. A common relief is sought. The interests of the class are adequately represented by the plaintiffs. The defendants have acted and refused to act on grounds generally applicable to the class.

DEFENDANTS

11. Defendant Suffolk County is a municipal corporation organized pursuant to the laws of the State of New York and is a political subdivision of New York.

12. Defendant Suffolk County Civil Service Commission, an agency maintained and operated by Suffolk County, is responsible for the establishment of qualification standards for the rank of police officer as well as the administration of examinations for said position and the initial screening of applicants for said position.

13. Defendant Suffolk County Police Department (hereinafter "SCPD"), an agency maintained and operated by Suffolk County, is responsible for the preservation of the public peace, the protection of life and property and the enforcement of State criminal laws and local ordinances in Suffolk County. The SCPD hires police officers from that group of persons who have taken

Appendix A

and passed open competitive civil service examinations for the position.

FACTS COMMON TO THE CLASS

14. Each of the plaintiffs has taken the most recent examination administered by the SCCSC for the position of police officer and has passed the examination.

15. Section 58 provides in relevant part that:

> Notwithstanding any other provision of this law or any general, special or local law to the contrary, no person shall be eligible for provisional or permanent appointment in the competitive class of the civil service . . . as a police officer of any police force or police department of any county . . . unless he shall satisfy the following basic requirements:
>
> (a) he is not less than twenty nor more than twenty-nine years of age . . . .

16. On information and belief, persons with scores as low as 84 on the Examination, have been appointed police officers by the SCPD.

17. All of the plaintiffs have received scores on the Examination and rankings on the resulting list such that, were it not for the operation of Section 58 and the resulting actions of the defendants, they would have been considered for appointment to the position of police officer in the SCPD.

18. Each of the plaintiffs has been notified by the SCCSC

that (s)he has been eliminated from consideration for the position of police officer solely because of the operation of Section 58.

CLAIM OF DENIAL OF EQUAL PROTECTION

19. The provision of Section 58 that no person over the age of twenty-nine may be appointed to the position of police officer bears no rational relationship to any legitimate state purpose, is arbitrary, capricious, and unreasonable and, as such, deprives plaintiffs and their class of the equal protection of the laws as guaranteed by the Constitutions of the United States and State of New York.

CLAIM OF CONFLICT WITH STATE HUMAN RIGHTS LAW

20. The New York Human Rights Law, Executive Law, Sections 291(1), 296(a)(a), (b) and (d) and 296(3-a)(a) and (b) prohibit discrimination in employment on account of age against all persons between the ages of eighteen and sixty-five.

21. Said provisions of the New York Human Rights Law were enacted after the age requirement of Section 58, make said age requirement void and unenforceable, and prohibit the complained of actions of the defendants in eliminating the plaintiffs and members of their class from consideration for appointment as police officers on account of their age.

WHEREFORE, Plaintiffs and their Class demand judgment against the defendants:

1. Declaring the age limitation contained in Section 58(1)(a) of the New York Civil Service Law to be void and unenforceable because it violates the equal protection clauses of the Constitutions

of the United States and New York State.

2. Enjoining the defendants and all persons acting under their supervision from enforcing or seeking to enforce Section 58 insofar as it prevents plaintiffs and members of their class from being given consideration for appointment to the position of police officer in the SCPD equal to that given to persons under the age of 29.

3. Restoring plaintiffs and members of the class found to be otherwise qualified to be police officers to the positions they would have been in had they not been eliminated from consideration for appointment to the SCPD as a result of Section 58, including awarding them back pay and seniority.

4. Granting Plaintiffs and their class such other and further relief, including attorneys fees and costs, as to the Court seems just, proper and equitable.

Dated: July 22, 1983
New York, New York

BADEN KRAMER & HUFFMAN

By: /s/_____

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APPENDIX B—ANSWER

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

File No. CV 83 3195 (JM)

JOHN DOYLE, BARBARA McCUEN, WILLIAM T. MILNE, FRANK MISIANO, JOHN J. PRESTA and KEVIN SWEENEY for themselves and all persons similarly situated,

Plaintiffs,

-against-

SUFFOLK COUNTY, SUFFOLK COUNTY CIVIL SERVICE COMMISSION and SUFFOLK COUNTY POLICE DEPARTMENT,

Defendants.

ANSWER

The defendants SUFFOLK COUNTY, SUFFOLK COUNTY CIVIL SERVICE COMMISSION and SUFFOLK COUNTY POLICE DEPARTMENT by their attorneys JAMES M. CATTERSON, JR., ESQ. and ORENSTEIN, SNITOW & PAULEY, P.C. as Special Counsel for the County Attorney of the County of Suffolk hereby alleges as follows:

1. Deny information or knowledge sufficient to form a belief as to the truth of the allegations set forth in paragraphs "1", "3", "4", "5", "6", "7", "8", "14", "16", "17" and "18" of the complaint.

Appendix B

2. Deny the allegations set forth in paragraph "2" of the complaint.

3. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "9" of the complaint, except specifically deny that putative members of the class have been or are subject to being eliminated by the defendants in consideration for appointment from the list resulting from Examination No. 79-5002-110 as a result of the unconstitutional operation of N.Y. Civil Service Law, § 58.

4. Deny knowledge or information sufficient to form a belief as to the truth of the allegations set forth in paragraph "10", except deny that there are common questions of law and fact affecting the rights of members of the purported class, and specifically deny that they are so numerous that joinder of all members of the class is impractical.

5. Admit the allegations contained in paragraph "12" of the complaint, except specifically deny that defendant SUFFOLK COUNTY CIVIL SERVICE COMMISSION is responsible for the establishment of qualification standards for the rank of police officer and the initial screening of applicants for said position.

6. Admit each and every allegation contained in paragraph "13" of the complaint, except specifically deny that the SCPD hires police officers.

7. Admit each and every allegation contained in paragraph "15" of the complaint, but reserves to the Court all questions and conclusions of law incidental thereto.

Appendix B

8. S. Deny each and every allegation contained in paragraph "19" of the complaint.

9. Admit each and every allegation contained in paragraph "20" of the complaint, but reserves to the Court all questions and conclusions of law intendent thereon.

10. Deny knowledge or information to form a belief as to the truth of the allegation contained in paragraph "21", but specifically deny that New York Human Rights Law § 58 prohibits the defendants from eliminating individuals from consideration for appointment as police officers to the Suffolk County Police Department on account of age.

AS AND FOR A FIRST SEPARATE, DISTINCT AND COMPLETE AFFIRMATIVE DEFENSE

11. The complaint fails to state a claim upon which relief may be granted.

AS AND FOR A SECOND SEPARATE, DISTINCT AND COMPLETE AFFIRMATIVE DEFENSE

12. Plaintiffs have failed to exhaust their administrative remedies.

AS AND FOR A THIRD SEPARATE, DISTINCT AND COMPLETE AFFIRMATIVE DEFENSE

13. The plaintiffs' actions are barred by applicable statutes of limitations.

Appendix B

AS AND FOR A FOURTH SEPARATE, DISTINCT AND COMPLETE AFFIRMATIVE DEFENSE

14 That the plaintiffs' cause of action is barred for failure to name an indispensible party, to wit; the State of New York.

AS AND FOR A FIFTH SEPARATE, DISTINCT AND COMPLETE AFFIRMATIVE DEFENSE

15. Class action status should be denied plaintiffs as they have not made a sufficient demonstration of the prerequisites required by FRCP § 23 for certification of the class.

AS AND FOR A SIXTH SEPARATE, DISTINCT AND COMPLETE AFFIRMATIVE DEFENSE

16. Defendants acted at all relevant times in good faith and with no intention to discriminate.

AS AND FOR A SEVENTH SEPARATE, DISTINCT AND PARTIAL AFFIRMATIVE DEFENSE

17. The SUFFOLK COUNTY CIVIL SERVICE COMMISSION and SUFFOLK COUNTY POLICE DEPARTMENT are not proper party defendants as they are not suable municipal corporations.

WHEREFORE, defendants SUFFOLK COUNTY, SUFFOLK COUNTY CIVIL SERVICE COMMISSION and SUFFOLK COUNTY POLICE DEPARTMENT respectfully request that the complaint be dismissed and that costs and a reasonable attorney fee be awarded to defendants.

Appendix B

Dated: Port Jefferson, New York
September 9th, 1983

s/ James M. Catterson, Jr.

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